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No. 87-1277

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

A. L. LOCKHART, DIRECTOR
ARKANSAS DEPT. OF CORRECTION ..... *Petitioner*

vs.

JOHNNY LEE NELSON ..... *Respondent*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

WHETHER, IN A CRIMINAL CASE, THE FORMER JEOPARDY CLAUSE OF THE FIFTH AMENDMENT AND THE FOURTEENTH AMENDMENT REQUIRES THAT AN APPELLATE COURT, AFTER HOLDING THAT CERTAIN EVIDENCE HAD BEEN IMPROPERLY ADMITTED AGAINST THE DEFENDANT, SHOULD DETERMINE THE SUFFICIENCY OF THE STATE'S CASE BY CONSIDERING ALL THE STATE'S PROOF THAT HAD BEEN ADMITTED INTO EVIDENCE OR BY CONSIDERING ONLY THE REMAINDER OF THE STATE'S PROOF THAT HAD BEEN PROPERLY ADMITTED INTO EVIDENCE.

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OPINIONS BELOW

The opinion of the United States Eighth Circuit Court of Appeals is reported as *Lockhart v. Nelson*, 828 F.2d 446 (1987), and is reprinted in the appendix to petitioner Lockhart's petition seeking a writ of certiorari from this Court. The opinion of the United States District Court for the Eastern District of Arkansas is reported as *Nelson v. Lockhart*, 641 F.Supp. 174 (1986), and is reprinted in the supplemental appendix to petitioner Lockhart's petition seeking a writ of certiorari from this Court.

JURISDICTION

The United States Eighth Circuit Court of Appeals handed down its opinion in this case on September 3, 1987. The Court of Appeals entered its mandate in this case on November 19, 1987. On November 9, 1987, Justice Blackmun granted an extension of time until December 31, 1987, for petitioner Lockhart to file his petition seeking a writ of certiorari. Petitioner Lockhart filed his petition seeking a writ of certiorari on December 30, 1987. This Court has discretionary jurisdiction to review this case pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> ". . .[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

On March 12, 1982, a jury in Union County, Arkansas, sentenced respondent Johnny Lee Nelson to twenty years imprisonment in the Arkansas Department of Correction. Nelson had pleaded guilty to underlying charges of burglary and theft of property and had agreed to be sentenced by a jury. Nelson was sentenced as an habitual offender pursuant to Ark. Stat. Ann. §§41-1001-03 (Repl. 1977) [currently codified with minor stylistic changes as Ark. Code Ann. §§5-4-501-02 (1987)]. The State introduced four prior convictions into evidence against Nelson. Pursuant to §41-1001(2) and §41-1003, the State had to prove beyond a reasonable doubt that Nelson had four prior felony convictions in order to make him eligible for sentencing as an habitual offender. Both the State and Nelson's trial counsel had failed to discover that Nelson had received a gubernatorial pardon for one of the prior convictions. The pardon was of great significance because pardoned prior convictions are inadmissible in Arkansas in habitual offender sentencing proceedings. *See Duncan v. State*, 254 Ark. 449, 452, 494 S.W.2d 127, 129 (1973). The trial court admitted the prior conviction that had been pardoned into evidence because Nelson's trial counsel did not know that the prior conviction had been pardoned and, therefore, did not ask the trial court to rule that it was inadmissible.

After Nelson was incarcerated in the Arkansas Department of Correction, he decided to challenge the validity of his sentence as an habitual offender. After exhausting his available state court remedies, Nelson filed a petition seeking relief pursuant to 28 U.S.C. §2254 in Federal District Court for the Eastern District of Arkansas. Lockhart moved to dismiss Nelson's petition seeking habeas corpus relief. Upon the order of the District Court, Lockhart's counsel made inquiries, discovered the existence of Nelson's pardon and supplemented Lockhart's motion to dismiss to admit the existence of a

pardon for one of the prior convictions that had been admitted into evidence against Nelson.

After learning of the existence of the pardon the District Court issued a preliminary order on September 20, 1985, in which it held that Nelson was entitled to be resentenced. The District Court appointed counsel to advise Nelson of the risk of going forward with the resentencing. Nelson's appointed counsel filed a response to a subsequent order by the District Court in which he raised the possibility that Nelson may have a Fifth and Fourteenth Amendment former jeopardy defense to any effort by the State to resentence him as an habitual offender. In response to this argument by Nelson's appointed counsel, the District Court issued an order on June 6, 1986 (published as *Nelson v. Lockhart*, 641 F.Supp. 174 [E.D. Ark. 1986]), in which the District Court held that Nelson did have a former jeopardy defense that barred any effort by the State to resentence him as an habitual offender. The Eighth Circuit Court of Appeals affirmed the District Court's order in *Lockhart v. Nelson*, 828 F.2d 446 (1987). This Court granted petitioner Lockhart's petition for a writ of certiorari on February 29, 1987.

SUMMARY OF ARGUMENT

This Court should resolve the issues posed in the instant case in light of *Burks v. United States*, 437 U.S. 1 (1978). *Burks* holds that a defendant in a criminal case has a Fifth and Fourteenth Amendment former jeopardy right not to be retried after an appellate court holds that the State's case against him was insufficient. *Burks* also holds that when an appellate court reverses for trial error, such as the incorrect receipt of evidence, the defendant has no former jeopardy bar to retrial. The instant case presents an issue left open by this Court in *Burks*' companion case, *Green v. Massey*, 437 U.S. 19 (1978): once an appellate court has concluded that a criminal defendant's conviction should be reversed because the jury received and considered inadmissible evidence, should the court consider the inadmissible evidence and the remainder of the State's proof or should the court consider only the remainder of the State's case in deciding whether the defendant has a Fifth and Fourteenth Amendment former jeopardy right not to be retried because the State failed to put sufficient evidence before the jury.

This Court has held in *United States v. Ball*, 163 U.S. 662, 672 (1896) and in its many progeny that resolution of former jeopardy issues depends upon a balancing of a criminal defendant's right not to be retried after successful challenge to his conviction on appeal against the State's right to punish criminal defendants whose guilt has been proven in a fair trial. The United States Eighth Circuit Court of Appeals erred in balancing respondent Nelson's former jeopardy right not to be resentenced as an habitual offender against Arkansas' right to punish him after proving his status as an habitual offender. The Eighth Circuit erred by excluding the part of the State's case that had been improperly admitted into evidence and by considering only the remainder of the State's case. The Eighth Circuit's approach does not give the State one fair opportunity

to muster its case for habitual offender sentencing against Nelson. The State did not have one fair opportunity to muster its case because the state trial court never ruled on the admissibility of one of Nelson's prior felony convictions and the State relied on the absence of such a ruling to its detriment. Had the state trial court been asked to rule on the admissibility of the prior felony conviction and had the trial court ruled that it was inadmissible, the State could have substituted another prior felony conviction of Nelson's in place of the one that was inadmissible. To avoid this result in the future, the State will be forced to offer every scrap of proof into evidence. Such "overtrying" of cases will greatly burden the administration of criminal justice.

The Eighth Circuit's disregard of the State's right to one fair opportunity to prove Nelson's status as an habitual offender and its focus on the prosecuting attorney's lack of preparation and his failure to make sure that the prior felony conviction at issue was admissible ignore a corollary of this Court's "trial error" holding in *Burks v. United States, supra:* incorrect receipt of evidence is usually the product of the prosecuting attorney's failure to thoroughly examine and prepare his or her case or the product of the prosecuting attorney's failure to understand the pertinent rules of evidence. *Burks* permits the State to retry a defendant and to make up for the incorrect receipt of evidence by offering substitute evidence on retrial, if such evidence is available, despite the prosecutor's having offered the inadmissible evidence to the trial court in the first place. The Eighth Circuit justifies its approach by holding that no *Burks*-type trial error occurred at respondent Nelson's state sentencing hearing because the state trial court did not explicitly rule that the evidence at issue, a prior felony conviction that had been pardoned, was admissible. This prerequisite for *Burks*-type trial error, an explicit ruling, albeit erroneous, by the trial court makes a defendant's former jeopardy right not to be retried depend on whether his trial

counsel challenged the admissibility at trial of the part of the State's case that is subsequently held on appeal to be inadmissible. The defendant has a former jeopardy bar to retrial only if his trial counsel *failed* to object to the State's evidence at issue — if the defendant's trial counsel objected and the trial court did explicitly rule, albeit erroneously, on the admissibility of the State's evidence at issue, then *Burks*-type trial error occurred and the defendant has no former jeopardy bar to retrial.

Finally, the Eighth Circuit's insistence that there can be no trial error in the absence of an explicit ruling by the trial court is contrary to this Court's teaching in *Burks* that it is the *incorrect receipt* of evidence that is trial error. Moreover, the Eighth Circuit's analytical approach is contrary to this Court's literal equation in *Burks* of an appellate court's decision that the State's proof was insufficient with a jury's verdict of acquittal. There is no doubt in this case that the jury had before it, and considered, evidence that was inadmissible in finding that respondent Nelson was an habitual offender. The equation in *Burks* of a jury's verdict with appellate review of sufficiency suggests that appellate courts, in reviewing the sufficiency of the State's case, should consider the *same* case that the jury considered and relied upon.

ARGUMENT

The instant case should be decided by this Court in light of its decision in *Burks v. United States*, 437 U.S. 1 (1978). *Burks* holds that for former jeopardy purposes an appellate court's decision that the evidence against a defendant was insufficient is the equivalent of a jury's verdict of acquittal and, therefore, bars a retrial of the defendant. *Burks* also holds that when reversible trial error, such as the incorrect receipt of evidence, occurs a defendant may be retried after successfully challenging his conviction on appeal. *Burks* at 14-5. The instant case presents an issue left open by this Court in *Burks*' companion case, *Greene v. Massey*, 437 U.S. 19, 26 n.9 (1978): once an appellate court has concluded that a criminal defendant's conviction should be reversed because the jury received and considered inadmissible evidence, should the court consider the inadmissible evidence and the remainder of the State's proof or should the court consider only the remainder of the State's case in deciding whether the defendant has a Fifth and Fourteenth Amendment former jeopardy right not to be retried because the State had failed to put sufficient evidence before the jury.[1] In the instant case the United States Eighth Circuit Court of Appeals evaluated respondent Nelson's former jeopardy claim by considering only that part of the State's case that had been properly admitted against him.

Specifically, the Eighth Circuit concluded that Nelson's Fifth and Fourteenth Amendment right not to be punished twice for the same offense barred the State from resentencing Nelson as an habitual offender because one of the four prior convictions that the jury had considered in sentencing Nelson

[1] The due process clause of the Fourteenth Amendment incorporates the Fifth Amendment's prohibition against placing a defendant twice in jeopardy. *Benton v. Maryland*, 395 U.S. 784, 793-96 (1969).

as an habitual offender was inadmissible, as a matter of state law, in habitual offender sentencing proceedings. There had been no objection at Nelson's state sentencing hearing to the admission into evidence of the inadmissible prior conviction because Nelson's trial counsel failed to realize that the prior conviction was inadmissible. (J. A. at 11-12). The Eighth Circuit held that the State's case for enhancement of Nelson's sentence as an habitual offender was insufficient because Arkansas' habitual offender sentencing statute required the State to prove the existence of at least four valid, prior felony convictions. Ark. Stat. Ann. §41-1001(2) (Repl. 1977) [currently codified with stylistic changes as Ark. Code Ann. §5-4-501(b) (1987)].[2] In order to resolve the former jeopardy issue posed in the instant case, this Court should balance Nelson's interest in the finality of the Eighth Circuit's determination that the State's habitual offender case against him was insufficient against Arkansas' interest in punishing Nelson as an habitual offender after the State has proven his status as an habitual offender beyond a reasonable doubt in a sentencing hearing that is fair to both Nelson and to Arkansas.

As a general matter, a state may retry a defendant who succeeds in overturning his conviction on appeal. *United States v. Ball*, 163 U.S. 662, 671 (1896). As this Court put the matter in *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984):

> [t]he Double Jeopardy Clause is not an absolute bar to successive trials. The general rule is that the Clause does –

[2] Petitioner Lockhart accepts as correct the Eighth Circuit's holding that this Court's decision in *Bullington v. Missouri*, 451 U.S. 430 (1981), would be properly applied to habitual offender sentencing in Arkansas, given the trial-like nature of Arkansas' habitual offender sentencing process, if the State's *entire* case that was presented to the jury, and which the jury considered, were insufficient.

not bar reprosecution of a defendant whose conviction is overturned on appeal. *United States v. Ball, supra.* The justification for this rule was explained in *United States v. Tateo*, 377 U.S. 463, 466 (1964), as follows:

> "While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *Id.* at 308.

Accord Montana v. Hall, 481 U.S. ___, 107 S.Ct. 1825, 95 L.Ed.2d 354 (1987); *United States v. DiFrancesco*, 449 U.S. 117, 131 (1980); *Burks, supra* at 14-5; and *United States v. Jorn*, 400 U.S. 470, 483-84 (1971) (plurality opinion); *see generally*, Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 Mich. L.Rev. 1001, 1034-40 (1980). Professor Westen writes:

> [b]ecause of its antiquity, and because its significance has until recently been masked by the fiction of waiver, the *Ball* principle is only now being recognized for what it is: the marking of a fundamental balance between a defendant's interest in finality and the state's interest in prosecution. *Ball* represents a basic assessment that even though the state is responsible for denying a defendant a fair trial the first time around, the state's interest in law enforcement is too great to justify immunizing a defendant from reprosecution.

In *Burks, supra*, this Court carved out an exception to the *Ball-Tateo* former jeopardy rule of retrial after appellate reversal; however, this Court has held that the *Burks'* exception to the *Ball-Tateo* principle is ". . . a narrow exception." *Tibbs v. Florida*, 457 U.S. 31, 39-41 (1982); *see also* Westen and Drubel, *Toward A General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81, 147 n.292 (1979). The *Burks* exception to the *Ball-Tateo* rule is so narrow that it does not include the Eighth Circuit's practice of evaluating the sufficiency of the State's proof by excluding the parts of the State's case that were improperly admitted into evidence and by considering only the remainder of the State's case — that part of the State's case that was properly before the jury.

Many lower court jurisdictions have decided the issue at hand contrary to the Eighth Circuit's resolution. These lower court jurisdictions are *United States v. Gonzalez-Sanchez*, 825 F.2d 572, 588 n.57 (1st Cir. 1987); *United States v. Hodges*, 770 F.2d 1475, 1477-78 (9th Cir. 1985); *Webster v. Duckworth*, 767 F.2d 1206, 1214-16 (7th Cir. 1985); *United States v. Marshall*, 762 F.2d 419, 423 (5th Cir. 1985); *United States v. Bibbero*, 749 F.2d 581, 586 n.3 (9th Cir. 1984); *United States v. Key*, 725 F.2d 1123, 1127 (7th Cir. 1984); *United States v. Tranowski*, 702 F.2d 668, 671 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984); *United States v. Sarmiento-Perez*, 667 F.2d 1239 (5th Cir.), *cert. denied*, 459 U.S. 834 (1982); *United States v. Harmon*, 632 F.2d 812 (9th Cir. 1980); *United States v. Mandel*, 591 F.2d 1347, 1373-74 (4th Cir.) *rev'd. on other grounds*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984); *People v. Rios*, 163 Cal. App. 3d 852, 870-71, 210 Cal. Rptr. 271, 283-4 (1985) and *People v. Harvey*, 163 Cal. App. 3d 90, 107-08, 208 Cal. Rptr. 910, 919-20 (1985); *People v. Sisneros*, 44 Colo. App. 65, 606 P.2d 1317 (1980); *State v. Gray*, 200 Conn. 523, 536-40, 512 A.2d 217, 225-6 (1986); *Hall v. State*, 244 Ga. 86, 93-4, 259 S.E.2d 41, 46-7 (1979); *People v. Taylor*, 76 Ill.2d 289, 309, 391 N.E.2d 366, 375

(1979); *Mulry v. State*, 399 N.E.2d 413, 419 (Ind. App. 1980); *Commonwealth v. Mattingly*, 722 S.E.2d 288 (Ky. 1986); *Hobbs v. Commonwealth*, 655 S.W.2d 472 (Ky. 1983); *State v. Boone*, 284 Md. 1, 12-8, 393 A.2d 1361, 1367-70 (1978); *Commonwealth v. Taylor*, 383 Mass. 272, 283-85, 418 N.E.2d 1226, 1233-34 (1981); *State v. Wood*, 596 S.W.2d 394 (Mo.), *cert. denied*, 449 U.S. 876 (1980); *State v. Verdine*, 290 Or. 553, 558-61, 624 P.2d 580, 583-85 (1981); *Roeder v. State*, 688 S.W.2d 856, 859-60 (Tex. Crim. App. 1985); *Porier v. State*, 662 S.W.2d 602, 605-06 (Tex. Crim. App. 1984); *State v. Lamorie*, 610 P.2d 342, 346, 347-49 (Utah 1980); *State v. Van Isler*, 168 W.Va. 185, 283 S.E.2d 836 (1981); and *State v. Frazier*, 162 W.Va. 602, 622-29, 252 S.E.2d 39, 50-3 (1979). The many lower court jurisdictions that reject the Eighth Circuit's method of separating the inadmissible evidence from the admissible and then evaluating the remaining admissible evidence do so to make sure that the State has a fair opportunity to convict the defendant. The jurisdictions that consider the State's entire case that was before the jury do so to accord the State the luxury of relying on the trial court's rulings that permit the State's evidence to go to the jury — letting the State rely on the trial court's ruling admitting the State's evidence lets the State avoid having to overtry its case by offering into evidence every scrap of proof, no matter how questionable. If these lower court jurisdictions followed the Eighth Circuit's approach, the State would be forced to "throw in the kitchen sink" to avoid reversal and dismissal because the State would never be entirely certain of how much of its case would be reviewed for sufficiency on appeal. As the Supreme Court of Missouri held in *State v. Wood*, 596 S.W.2d 394 (1980):

> [w]hen the trial court erroneously admits evidence resulting in reversal, as in the instant case, the State should not be precluded from retrial even though when such evidence is discounted there may be evidentiary insufficiency. The prosecution in proving its case is entitled to rely upon the rulings of the court and proceed

> accordingly. If the evidence offered by the State is received after challenge and is legally sufficient to establish the guilt of the accused, the State is not obligated to go further and adduce additional evidence that would be, for example, cumulative. Were it otherwise, the State, to be secure, would have to assume every ruling by the trial court on the evidence to be erroneous and marshal and offer every bit of relevant and competent evidence. The practical consequences of this would adversely affect the administration of justice, if for no other reason, by the time which would be required for preparation and trial of every case. This is consistent with *Burks v. United States, supra*, which lists among examples of trial error which do not invoke the Double Jeopardy Clause with regard to retrial, the "incorrect receipt or rejection of evidence." *Id.* at 398-99.

Accord Tranowski, supra; Harvey, supra; Boone, supra; Verdine, supra; and Note, *Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence*, 31 U. Chi. L. Rev. 365, 371-72 (1964); *see* Westen, *The Three Faces of Double Jeopardy, supra*, at 1058-59 (former jeopardy does not bar retrial where the State's case is changed for the worse after the defendant's successful appeal). In its opinion, the Eighth Circuit simply ignores the "overtry" threat to future cases and focuses only on the case at hand. *See* app. to Lockhart's *cert.* pet. at A-7—A-8. In addition, Professors LaFave and Israel note that the *Wood* procedure is the better procedure. 3 W. LaFave and J. Israel, *Criminal Procedure* §24.4 n.29 (1984). Moreover, the author of the student note *Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence, supra*, (cited with approval by this Court in *Burks* at 15-6) agrees with Professors LaFave and Israel that the *Wood* procedure is correct and rejects the approach taken by the Eighth Circuit. Note, *Double Jeopardy, supra*, at 371-72. As Professors LaFave and Israel observe at page 91 of 3 *Criminal*

Procedure, if the *Wood* rule is not followed, the State has not received "one fair opportunity" to make its proof. Where the State has not received "one fair opportunity" to present its case, former jeopardy considerations do not bar a retrial of the defendant. *Burks*, *supra* at 15-6. Moreover, the *Wood* procedure is consistent with *Burks'* literal equation of an appellate court's decision that the State's proof was insufficient with a jury's verdict of acquittal. In *Burks*-type cases like the instant case, the evidence found by the appellate court to be inadmissible had been before the jury and the jury, of course, had no right to find that certain pieces of evidence offered by the State were inadmissible. If an appellate court's decision that the State's evidence was not sufficient is to be a *true* equivalent of a jury's verdict of acquittal for former jeopardy purposes, then appellate courts should consider the *same* State's case that the jury considered. As the United States Fourth Circuit Court of Appeals put the matter in *United States v. Mandel*, 591 F.2d 1347 (4th Cir.), *rev'd. on other grounds*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980):

> [w]hen a conviction is reversed for trial error, however, different considerations are involved. In cases where the sufficiency of the evidence has not been questioned, no problem is presented, for the error is procedural only, although it may be of constitutional dimension. The hard question is whether an appellate court must decide the question of the sufficiency of evidence if it has been presented in a case which would have to be reversed in all events for procedural error. We are of the opinion that ordinarily an appellate court should not be required to decide that question, although we can envision the extraordinary case which might demand it. In many cases, such as the one at bar, with a vast volume of evidence, it would be doing a distinct disservice to the defendants to decide on appellate review that if a part of the evidence had been omitted the balance would be sufficient to convict. Among other things, this rather invades the province of the jury and the trial court on retrial. The jury is the proper trier of the facts, including the credibility of witnesses and the inferences to be drawn from the testimony. Perhaps the faulty evidence was the key to the jury's decision; perhaps it was not. Who can say? Certainly not a court of appeals which has neither seen the witnesses nor heard them testify. *Id.* at 1373-74.

Accord Commonwealth v. Mattingly, *supra* and *State v. Frazier*, *supra*. The Eighth Circuit argues that *Mandel* is inapplicable because the instant case does not involve a vast volume of evidence. *See* app. to Lockhart's *cert.* pet. at A-7—A-8. The Eighth Circuit fails to explain why it is that a defendant's former jeopardy rights should depend upon the fortuity of the amount of evidence the State submits. Former jeopardy rights ought not to turn on such a haphazard occurrence. Moreover, the *Wood* procedure is consistent with this Court's holding in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) that on habeas corpus review federal courts evaluating the sufficiency of the State's case against the petitioner — in order to determine whether the State proved the petitioner's guilt beyond a reasonable doubt — should review *all* of the State's evidence.

Both the Eighth Circuit and the United States District Court for the Eastern District of Arkansas ignored any concern with fairness to the State in deciding this case. Both have focused on the prosecuting attorney's failure to check the validity of the prior felony convictions that he offered into evidence against Nelson. *See* app. to Lockhart's *cert.* pet. at A-6—A-7. In essence, the Eighth Circuit held that Nelson has a former jeopardy right not to be resentenced as an habitual offender because the prosecuting attorney was poorly prepared. The Eighth Circuit's concern with the prosecuting

attorney's lack of preparation ignores the role of Nelson's counsel, who was equally unprepared. Nelson's counsel had failed to check on the validity of the State's proffered prior convictions and, therefore, he failed to make a timely objection to the introduction into evidence of the prior conviction that had been pardoned. Had Nelson's trial counsel made a proper objection to the admission into evidence of the prior conviction that had been pardoned, the trial court would have made a ruling on the admissibility of the prior conviction. Had the State been favored with a correct ruling from the trial court, it would have had a chance to make up the deficiency in its case — Nelson had at least three other prior felony convictions and any one of them could have been substituted for his prior felony conviction that had been pardoned. *See* Nelson's brief in opposition to petitioner Lockhart's petition for a writ of certiorari at page two, footnote one. Admittedly, the State was poorly prepared at Nelson's sentencing hearing, but the State's lack of preparation should not deprive it of its right to rely on correct rulings by the trial court and of its right to have an effective defense counsel assist the trial court in making a correct ruling on the admissibility of evidence. When the trial court does not rule on the admissibility of evidence because defense counsel failed to object to the admissibility of the evidence, the State has not had one *fair* opportunity to muster its case before the jury if an appellate court should subsequently decide that that part of the State's case was inadmissible. Moreover, the Eighth Circuit's preoccupation with the prosecuting attorney's lack of preparation ignores a corollary of this Court's "trial error" holding in *Burks v. United States*, *supra*: trial error, insofar as it consists of the incorrect receipt of evidence, is the product of the prosecuting attorney's lack of investigation of his or her case or is the product of the prosecuting attorney's failure to know the rules of evidence and their applicability at trial. In all cases where the incorrect receipt of evidence occurs, one could argue that the prosecuting attorney is always ultimately responsible because he or

she proffered the tainted evidence to the trial court. Moreover, as a practical matter, in all incorrect-receipt-of-evidence trial error cases the State gets a second opportunity to muster its evidence insofar as it must replace the evidence that was held on appeal to be inadmissible. *See* Westen and Drubel, *Toward A General Theory*, *supra*, at 166 n.362.

The Eighth Circuit allows itself to become obsessed with the prosecuting attorney's failure to properly prepare his case and lets itself ignore the fairness issue embodied in the *Wood* rule by the artifice of holding that no *Burks* "trial error" occurred at Nelson's habitual offender sentencing hearing in state court. According to the Eighth Circuit, no "trial error" occurred because the trial court was not asked to rule on the admissibility of the prior conviction that had been pardoned. *See* app. to Lockhart's *cert.* pet. at A-6. The Eighth Circuit's holding on this point is inconsistent with its subsequent observation that Nelson's pardoned prior felony conviction ". . .unarguably was not admissible." *See* app. to Lockhart's *cert.* pet. at A-8. There is no doubt in this case that the pardoned prior felony conviction was admitted into evidence and that the jury did consider it. How can the pardoned prior felony conviction be "not admissible" if the incorrect receipt of evidence, trial error, *did not* occur at the state sentencing hearing? The Eighth Circuit fails to explain this anomaly. The Eighth Circuit's analysis seems to suggest that appellate court rulings that evidence was inadmissible are not recognitions of trial errors, however, this Court's decision in *Burks* holds that it is the *incorrect receipt* of evidence that is trial error. *Burks* at 15.

Moreover, another anomaly inheres in the Eighth Circuit's conclusion that trial error occurs only if the trial court explicitly rules on the admissibility of the evidence at issue. In making its facile distinction between inadmissible evidence that was admitted because the trial court did not explicitly rule

on the admissibility of the evidence and inadmissible evidence that was wrongly admitted into evidence by an explicit ruling of the trial court, the Eighth Circuit fails to explain why it is that a defendant's former jeopardy right not to be retried after a verdict of acquittal should depend upon whether his counsel made an objection at trial. Presumably, had Nelson's trial counsel made an objection to the admissibility of the pardoned prior felony conviction and had defense counsel's objection been overruled then the Eighth Circuit would have found that trial error occurred and would have ordered that Nelson's habitual offender sentence be reversed and remanded. Pursuant to the Eighth Circuit's analysis, defense counsel can win a former jeopardy victory for his client on appeal by *failing* to object at trial. Unscrupulous defense counsel could lay a trap for the prosecution by intentionally withholding an objection at trial (unscrupulous counsel would be very likely to do so where the State's tainted evidence could easily be replaced) and by then falsely confessing ineffective assistance of counsel in order to reach the merits of the sufficiency issue on appeal.

Finally, the Eighth Circuit's insistence that there can be no trial error in the absence of an explicit ruling, albeit erroneous, by the trial court is contrary to this Court's teaching in *Burks* that it is the *incorrect receipt* of evidence that is trial error. This Court did not hold in *Burks* that the trial court must explicitly rule on the admissibility of the State's evidence, but held merely that trial error occurs if evidence that is before the jury creates a ". . . judicial process which is defective in some fundamental respect. . . ." *Burks* at 15. There is no doubt that Nelson's jury had before it evidence — the inadmissible prior conviction — that prejudiced Nelson in a fundamental way.

CONCLUSION

The United States Eighth Circuit Court of Appeals' holding in the instant case that respondent Nelson has a Fourteenth and Fifth Amendment former jeopardy right not to be resentenced as an habitual offender, given the facts of this case, is an incorrect interpretation of these Amendments to the United States Constitution and should be reversed by this Court. Petitioner Lockhart respectfully requests that this Court hold that respondent Nelson does not have a former jeopardy right, given the facts of this case, not to be resentenced as an habitual offender.

Respectfully submitted,

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